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IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF FORMER FEDERAL OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* states that counsel for Petitioner and Respondent received timely notice of intent to file this brief. Both parties have lodged letters granting blanket consent to the filing of *amicus curiae* briefs.

- Michael B. Mukasey, Attorney General (2007–2009)
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- Larry Dean Thompson, Deputy Attorney General (2001–2003)

We are former federal officials with first-hand knowledge of the types of interactions that routinely occur between government officials and members of the public. Our collective experience includes serving as elected officials and advising Presidents and other federal officials on the steps needed to ensure that those interactions comply with ethics guidelines and a variety of federal laws—including criminal statutes. Indeed, among the signatories to this brief are Counsels to the President who have served every President of the United States since Ronald Reagan.

In this case, the court of appeals criminalized the routine practice by public officials of giving access to their constituents, including those who have supported the official in the past. That court approved jury instructions defi ' ıg an "official act" that can form the basis of a c nal quid pro quo as *any* action that, "by settled pı actice," public officials "customarily perform[ ]" on questions or matters. Pet. App. 47a-48a, 275a. According to the court, the act can also be just "one in a series of steps to exercise influence or achieve an end." Pet. App. 48a, 275a. The court thus affirmed a corruption conviction that

could have been based on any one of "five specific actions," Pet. App. 87a, including sending party invitations to a supporter (the alleged bribe payor) and people he recommended, asking an aide a question about the supporter's business, appearing in public at an event regarding the supporter's business, or suggesting a meeting between his subordinates and the supporter, *see* Pet. 3-4.

We have no personal interest in the outcome of this particular prosecution. Nor is it our role to pass judgment on whether the conduct prosecuted here was prudent. But that is likewise not the purpose of federal public corruption law. That law should not be broadened to subject government officials to the threat of prosecution for engaging in innocent conduct that occurs on a routine basis.

The Fourth Circuit's interpretation of "official act," however, would do just that—even though numerous courts, including this Court and the Fourth Circuit's neighboring jurisdiction, the D.C. Circuit, have understood official action as limited to the exercise of governmental power. *See, e.g.*, *United States v. Birdsall*, 233 U.S. 223, 229-31 (1914) (special officers conducted official acts by advising the Commissioner of Indian Affairs to recommend judicial clemency for particular persons where regulations required special officers to advise the Commissioner on the effects of clemency grants in particular cases); *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (honest services statute applies "not only to formal official action like votes but also the informal exercise of influence on bills by a legislator"); *Valdes v. United States*, 475 F.3d 1319, 1325 (D.C. Cir. 2007) (en banc) (official acts include "decisions that

the government actually makes," such as "a congressman's use of his office to secure Navy contracts for a ship repair firm"); *see also United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999) (rejecting a reading of the federal gratuity and bribery statute that would expand the meaning of "official acts" to include the President's "receiving sports teams at the White House" or the Secretary of Education's "visit to [a high] school").

We respectfully urge this Court to grant certiorari to resolve the conflict created by the lower court's decision so that officials can carry out their duties without fear of prosecution for granting the access that our representative democracy requires to function.

SUMMARY OF ARGUMENT

I. The court of appeals affirmed an erroneous interpretation of the term "official act" that would enable federal prosecutors to attach corruption charges to legitimate, routine conduct by public officials that falls far short of governmental action "on" any particular issue or question—for example, sending cocktail-reception invitations, or suggesting that a staffer meet with a constituent. 18 U.S.C. § 201(a)(3); *see* Pet. 3-4. Indeed, the court's interpretation provides officials and their advisors with no reliable means of distinguishing between permissible expressions of gratitude or legitimate grants of political access, on the one hand, and official actions subject to criminal prosecution, on the other. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

The careful definition of the term "official action" is a significant legal bulwark against criminalizing

routine conduct by public officials. This Court has held, for example, that campaign contributions may serve as the "quid" in a criminal quid pro quo. *See McCormick v. United States*, 500 U.S. 257, 273 (1991). Officials also are frequently reimbursed by private parties for travel expenses, and may receive gifts of modest value. *See, e.g., United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999). The federal bribery laws do not distinguish among these things of value. The decision below would thus leave the sound exercise of prosecutorial discretion as the sole obstacle to a felony indictment alleging that one or more of these receipts was the "quid," and that a mere customary action, divorced from any exercise of actual government power, was the "quo." And the overbreadth of the jury instructions endorsed below is only exacerbated by their statement that it is no defense that the official would have engaged in the activity at issue even if he had received nothing from the person who supposedly benefited. This Court's review is necessary to clarify what constitutes an "official action" for purposes of federal public corruption laws.

II. If allowed to stand, the court of appeals' breathtaking expansion of public-corruption law can be expected to chill federal officials' interactions with the people they serve. These officials may no longer be able to conduct routine interactions with constituents and other members of the public free from the apprehension that conduct long accepted as permissible may trigger a criminal investigation and prosecution. The decision could thus cripple the ability of elected officials to fulfill their role in our representa-

tive democracy by understanding and serving the needs of their constituents.

The Fourth Circuit's decision is particularly problematic for the many public officials who work in Washington, D.C. but reside in Maryland or Virginia. For these officials, the applicable federal corruption standards will change each day during their commute, *see United States v. Ring*, 706 F.3d 460, 469 (D.C. Cir. 2013); *Valdes v. United States*, 475 F.3d 1319, 1325 (D.C. Cir. 2007) (en banc), to say nothing of when they visit family or constituents, *see United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008); *United States v. Rabbitt*, 583 F.2d 1014, 1028 (8th Cir. 1978), *abrogated in part on other grounds by McNally v. United States*, 483 U.S. 350 (1987). This Court's review is needed to provide uniformity among the circuits and clarity on the scope of federal public corruption law

ARGUMENT

Federal bribery law forbids quid pro quo exchanges. *See McCormick v. United States*, 500 U.S. 257, 273 (1991). That is, public officials may not agree to receive anything of value in return for performing an "official act." The federal bribery statute defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). Courts have consistently understood this definition to mean what it says: an exercise of actual governmental power, either directly (for example, voting on

legislation or awarding a contract) or indirectly (such as pressuring another official to vote a certain way or grant a contract to a particular party). *See* Pet. 12-20.[2]

The court of appeals departed from this line of authority when it adopted the view that an "official act" can be one of the many routine and simple activities in the day-to-day life of a public servant: any actions that "by settled practice" a person in that position "customarily performs, even if those actions are not described in any law, rule, or job description." Pet. App. 275a. In approving this novel "customarily performs" standard, the court failed to exclude commonplace, lawful behavior, such as: "[i]ngratiation and access," which are "not corruption," *Citizens United v. FEC*, 558 U.S. 310, 360 (2010); "purely informational inquiries," *United States v. Ring*, 706 F.3d 460, 469 (D.C. Cir. 2013); and helping a donor "gain a friendly ear," *United States v. Rabbitt*, 583 F.2d 1014, 1028 (8th Cir. 1978), *abrogated in part on other grounds by McNally v. United States*, 483 U.S. 350 (1987). To the contrary, the court endorsed the view that "official action" encompasses conduct several steps removed from what has long been thought to be an official act: The jury was told that the definition extends to "actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps

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[2] As petitioner explains, the statutory definition of "official act" in Section 201(a)(3) is before the Court, notwithstanding that the prosecution was brought under other federal criminal statutes, because the honest-services statute draws content from the federal bribery statute and a bribe for "official acts" violates the Hobbs Act. *See* Pet. 11 n.1.

to exercise influence or achieve an end." Pet. App. 275a.

Based on our experience as former federal officials, we believe that this sweeping expansion of Section 201(a)(3)'s definition of "official act" will have damaging practical consequences for the ability of elected and appointed officials effectively to perform their duties. If allowed to stand, the decision below will subject to potential prosecution numerous routine behaviors that are essential to the day-to-day functioning of our representative government. To effectively serve, public officials must interact with the public, seeking to understand their needs and learn about their concerns. And elected officials are *expected* to advocate, publicize, and implement the goals of the people who elected them: That, after all, is their job.

If the mere grant of access to a public official or one of her subordinates were enough to qualify as an official act, though, public officials would need to seek and obtain legal opinions each time they engage in a wide array of heretofore innocent and indeed publicly beneficial activities. Moreover, public officials would be put at risk if they hear out the views of persons whose subjective intent is for the access to be the first step in achieving an end. That, after all, is an important reason why people seek access to public officials.

The chilling effect of the court of appeals' standard would negatively affect the way public officials carry out their duties, substantially interfering with their ability to serve the public. For example, federal officials would need to dramatically alter their ap-

proaches to "meet and greets" with constituents or speeches delivered at conferences. They would need to consider whether it is worth the risk of prosecution to interact with any person or group that has ever given them anything of value, including otherwise lawful campaign contributions or gifts. And they may well decide, in many cases, to forego such interactions altogether. The public would be ill-served if officials needed to erect those artificial barriers between themselves and the people they serve. Indeed, the court of appeals' approach would make qualified individuals think long and hard before entering public service in the first place. The problems with the court of appeals' opinion are only compounded by the fact that it affects thousands of federal officials who reside in the jurisdiction of the Fourth Circuit but work in the jurisdiction of the D.C. Circuit, which has not accepted the Fourth Circuit's expansive interpretation of "official act."

This Court should grant certiorari and reject the court of appeals' novel and sweeping interpretation of official act under Section 201(a)(3), construing this criminal statute narrowly to avoid damaging effects on public service.

I. THE DECISION BELOW ENDORSED AN ERRONEOUS INTERPRETATION OF "OFFICIAL ACT" THAT WOULD SUBJECT INNOCENT, ROUTINE CONDUCT BY PUBLIC OFFICIALS TO CRIMINAL PROSECUTION.

A. The Court Of Appeals' Interpretation Conflicts With Decisions From This Court And From Other Circuits.

For the reasons ably explained by petitioner, the court of appeals committed serious error in its interpretation of "official act." Pet. 11-26. We emphasize that when the court of appeals endorsed instructions that allowed the jury to convict for "customary" conduct divorced from the exercise of actual governmental power, it committed the very mistake that this Court warned against fifteen years ago in *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999). Certain common activities by public officials may well be "official acts in some sense" but are *not* illegal "quos" under federal law. *Id.* at 407 (internal quotation marks omitted); *see also supra* at 6-7. In fact, as the Eighth Circuit has correctly held, even access that *could* lead to an official act at some point in the future is not itself an official act. *See, e.g.*, *Rabbitt*, 583 F.2d at 1028 (finding that mere introduction to a state official who might be able to award an architectural contract to the purported briber was insufficient to constitute "official action," without evidence of actual influence on that government decision).

By declining to exclude such behavior from the definition of an official act within the meaning of Section 201(a)(3), the lower court not only acted con-

trary to precedent but ran headlong into the First Amendment. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion) ("[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."). Because the court of appeals' erroneous interpretation of "official act" conflicts with decision of this Court and of other Circuits, plenary review is warranted. *See* Pet. 11-26.

B. The Court Of Appeals' Sweeping Interpretation Would Have Dangerous Consequences In Many Contexts.

The consequences of the court of appeals' interpretation of "official act" extend far beyond the facts of this case. The legal meaning of an "official act" in a federal bribery prosecution is the same regardless of the nature, value, or amount of the particular "quid" at issue. Thus, if the Fourth Circuit's construction of "official act" is not reviewed, the decision below would have dangerous ramifications in a wide variety of common situations. For example, otherwise permissible campaign contributions, travel reimbursement, and small token gifts also qualify as the "quid" that—when married with the court of appeals' expansive test for the "quo" of "official action"—could form the basis of federal criminal prosecution at the sole discretion of federal prosecutors.

1. Campaign Contributions

Campaign contributions, no less than other payments, can be the thing of value supposedly received in exchange for performing an official act. *See, e.g.*, *McCormick*, 500 U.S. at 273 ("The receipt of [politi-

cal] contributions is also vulnerable under the [Hobbs] Act if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."). Politicians of all party affiliations frequently offer supporters access—private meals with the politician or her staff, tickets to campaign events that will be accessible only to contributors, or meetings with policy advisors—in return for specified contributions in lawful amounts. During the 2012 presidential campaign, for example, a $10,000 contribution secured a photo opportunity with either Governor Romney or President Obama.[3]

If the decision below is correct—if "official action" is what governmental officials "customarily" do, so long as it can be said to have the "purpose or effect of exerting some influence" on government policy, Pet. App. 54a—then such commonplace exchanges would be grounds for federal bribery prosecutions. Criminalizing exchanges of campaign contributions for access would jeopardize not only "conduct that has long been thought to be well within the law but also conduct" that this Court has called "unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *McCormick*, 500 U.S. at

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[3] Julie Pace, *What $40,000 Gets You in Presidential Fundraising*, MPR News (June 7, 2012), http://goo.gl/tRZHAz ("Write a big check, and you'll get you a picture with the president and a chance to swap political strategy with him—all while enjoying a gourmet meal at the lavish home of a Hollywood celebrity or Wall Street tycoon. Mitt Romney is offering donors perks that include everything from a private dinner with him to seats at the fall debates.").

272. Indeed, the jury instructions permitted by the decision below are so broad that even inviting a campaign donor and some of the donor's recommended guests to an evening reception at which no official business is discussed qualifies as an official act—one in a series of steps to achieve the donor's end—because that is something elected officials "customarily" do. As petitioner notes, this conduct fits comfortably within the Fourth Circuit's capacious definition of official action. The jury could have convicted for that conduct alone, Pet. 26, yet the court of appeals did not attempt to explain how it could possibly be an "official act."

It is cold comfort that the government must show an "explicit" quid pro quo agreement to secure a bribery conviction in cases involving campaign contributions. *E.g.*, *McCormick*, 500 U.S. at 273. After all, officials often *do* make explicit that a campaign contribution will secure access to an official and the official's staff. *See, e.g.*, Jonathan Weisman, *G.O.P Error Reveals Donors and the Price of Access*, N.Y. Times (Sept. 24, 2014), http://goo.gl/wFZzEo (donors would receive private meals "with the Republican governors and members of their staff," as well as tickets to seminars and discussion groups for "a $50,000 annual contribution or a one-time donation of $100,000" or, for twice those sums, dinner and a meeting at a Washington hotel).

Even without a campaign mailing as Exhibit A on the explicit-agreement element, the government need not produce a witness who heard an official and a contributor agree to an exchange. Jurors instead are permitted to infer an "explicit" agreement from circumstantial evidence. *See, e.g.*, *Evans v. United*

States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) ("The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions."); *United States v. Siegelman*, 640 F.3d 1159, 1171-72 (11th Cir. 2011) (per curiam); *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995).

Suppose that a donor makes a sizeable contribution to a President's re-election campaign a week before the donor's spouse visits the White House for a meeting with the President to discuss a policy matter. A jury may well infer that the contribution's timing was no coincidence. (And, as happened here, the donor, in exchange for prosecutorial leniency, might testify that the access was the reason behind the contribution.) Thus, if a meeting, standing alone, can be an official act, a prosecutor could seek an indictment for bribery no matter how routine, disclosed, or ethical the behavior. Mere "access" on a matter of interest to the donor would be a federal crime just because an official received something of value in return.

In failing to assess the negative consequences of the broad definition of "official act" that the court of appeals endorsed—the "quo" in federal bribery prosecutions—the court failed to protect the legitimate, pervasive, and constitutionally protected role of campaign contributions in federal elections. This Court has declared that mere "[i]ngratiation and access are not corruption." *Citizens United*, 558 U.S. at 361. The court below, however, dismissed this admonition as a mere talisman, confined to the context

of "campaign-finance case[s]," not those involving either "the honest-services statute [or] the Hobbs Act." Pet. App. 64a. The First Amendment must not be so easily dismissed. This Court should grant review to prevent the criminalization of many types of conduct in this context that have never before been treated as public corruption, including access that the Constitution affirmatively protects.

2. Travel Expenses

Officials also often receive items "of value" in the form of reimbursement for travel expenses, meals, or outings. Consistent with applicable federal regulations, federal officials often travel at private expense—thus sparing taxpayer dollars—to deliver speeches, to perform fact-finding missions, or to attend conferences.[4]

Yet under the court of appeals' decision, an official who agrees to give a speech and engage in discussion on matters within the scope of his or her du-

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[4] *See* Peter Jacobs, *The Most Notable College Commencement Speakers of 2014*, Business Insider (Mar. 24, 2014), http://goo.gl/5LqrqW (listing, among others, the Chairman of the Joint Chiefs of Staff, the Chair of the Federal Reserve, the Secretary of Labor, and the Secretary of State as commencement speakers at private institutions); Fredreka Schouten, *Lawmakers Accept Millions in Free Travel*, USA Today (Feb. 27, 2014), http://goo.gl/3UzBZa ("Members of Congress took more than $3.7 million worth of free trips last year—the highest price tag for privately funded travel in a decade."); Chris Young et al., *Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars*, The Center for Public Integrity (May 27, 2014), http://goo.gl/ybfNQb (reporting that 185 federal district and appellate judges attended 109 privately funded seminars over a recent four-year period).

ties could be guilty of a felony if the jury concludes that the official accepted the reimbursement of travel expenses in return for "being influenced in" her decision to make the trip and deliver the address. 18 U.S.C. § 201(b)(2)(A). The government could also allege that any discussion during the visit of matters of interest to those who paid the expenses are official acts in exchange for such payments. These bizarre results run directly counter to this Court's admonition that it is not a federal crime for "a group of farmers" to provide "a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy." *Sun-Diamond*, 526 U.S. at 407 The way "to eliminate [such] absurdities," the Court explained, is "through the [proper] definition" of "official act." *Id.* at 408 (emphasis omitted). But under the decision below, receiving a reimbursement would be criminal if, for example, the discussion has "the purpose or effect of exerting some influence" on the matters discussed in the official's speech. Pet. App. 54a. This Court should grant review to avoid that absurd result.

3. Minor Gifts

Even gifts of *de minimis* value could potentially be criminalized under the Fourth Circuit's holding. The statutory prohibition on bribery is broader than related ethics rules because it contains no exception for minor gifts. *Compare* 18 U.S.C. § 201(b), *with* 5 C.F.R. § 2635.204; *see Sun-Diamond*, 526 U.S. at 411-12. Thus, returning to the example in *Sun-Diamond* of an Agricul[illegible]e Secretary who agrees to discuss ethanol subsidies with a local group of farmers, the gift to the Secretary of a personalized

plaque commemorating the event could be a federal crime under the Fourth Circuit's approach if the jury concluded that the gift (likely accompanied by a bit of favorable local publicity) motivated the Secretary to meet with the group.[5]

C. The Overbreadth Of The Jury Instructions Endorsed Below Was Magnified By Their Failure To Exempt Acts That The Official Would Have Done Anyway.

In addition to criminalizing conduct that is routine in the everyday life of a public official, the instructions affirmed by the Fourth Circuit informed the jury that it is no defense that the official would have engaged in the activity even if he had not received the thing of value. Specifically, they charged the jury that:

> [I]t is not a defense to claim that a public official would have lawfully performed the official action in question anyway, regardless of the bribe. It is also not a defense that the official action

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[5] The ethics rules governing Executive Branch employees provide that gifts accepted consistent with those rules "shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. § 201(c)(1)(B)." 5 C.F.R. § 2635.202(b). They do not, however, purport to create any safe harbor with respect to bribery, nor could they. *See Sun-Diamond*, 526 U.S. at 411 ("We are unaware of any law empowering OGE to decriminalize acts prohibited by Title 18 of the United States Code."). And even as to illegal gratuities, the safe harbor contains several exclusions, subjecting federal officials to potential criminal liability for accepting any gift "in return for being influenced in the performance of an official act" or "in violation of any statute." 5 C.F.R. § 2635.202(c)(1), (4).

> was actually lawful, desirable, or even beneficial to the public.

Pet. App. 274a-275a.

In other words, a jury would be able to convict even if the official would have traveled to give a speech without a promise of reimbursement for expenses, or even if the campaigning official would have listened to similar concerns voiced by a constituent who did not make a contribution to the re-election effort. Nor would it be a defense—or even relevant, for that matter—that the conduct defined as an official act was lawful, ethical, and beneficial to the public.

This part of the instruction further broadened the scope of criminal liability endorsed by the Fourth Circuit and magnified the importance of the legal errors in this case. Taken as a whole, the decision below would empower prosecutors nationwide to indict federal officials for routine beneficial conduct that they would have engaged in as a matter of normal course. This Court should grant review to resolve this vitally important question of federal law.

II. THE DECISION BELOW WOULD CHILL FEDERAL OFFICIALS IN THE EFFECTIVE PERFORMANCE OF THEIR DUTIES.

Federal officials have good reason to be apprehensive about the Fourth Circuit's unprecedented broadening of the criminal bribery laws: It casts a cloud over activities that are fundamental to the operation of a representative democracy.

It is the responsibility of federal legislative and executive branch officials to understand the views of

their constituents and the general public so as to act in their best interests. The people, in turn, help elect those individuals whom they expect will act consistently with those interests. "'It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.'" *Citizens United*, 558 U.S. at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)). At bottom, "'[d]emocracy is premised on responsiveness.'" *Id.*; *cf. Ring*, 706 F.3d at 463 ("Lobbyists serve as a line of communication between citizens and their representatives, safeguard minority interests, and help ensure that elected officials have the information necessary to evaluate proposed legislation."). Simply put, "'[f]avoritism and influence are not avoidable in representative politics.'" *Citizens United*, 558 U.S. at 359 (second alteration in original) (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)).

If federal officials are to effectively perform their duties, they must have unhindered access to the people. To that end, many federal officials customarily take the opportunity to interact with the public, including those who have supported them, in numerous beneficial, ethical, and fully disclosed ways. The fact that many persons contribute money with a particular policy objective in mind has never before been thought to transform these commonplace interactions into official actions "on" a particular "question" or "matter." Yet the decision below permits a public-corruption conviction for any "ac[t] that a public official customarily performs," even if the act can

only be described as "one in a series of steps to exercise influence" *or* "achieve an end," and even if the official has no "actual or final authority over the end result," so long as the alleged bribe payor "reasonably believes" that the official has "influence, power or authority over a means to the end sought by the bribe payor," Pet. App. 275a.[6] This could subject the following routine conduct to grand jury investigation and potential felony conviction if a federal prosecutor is so inclined:

- Members of Congress are frequently invited to travel on privately funded fact-finding missions, which allow them to visit businesses, listen to constituents, and learn from local experts.[7]
- Cabinet members commonly deliver commencement addresses at private colleges and universities—which award them honorary degrees—thereby giving the graduates the opportunity to learn from and be inspired by these federal officials.[8]
- The President and the officials who serve him regularly invite campaign contributors to events

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[6] The district court instructed the jury that the alleged bribe payor's subjective beliefs may be relevant to whether conduct is an "official act" without distinguishing between the Hobbs Act charges and the honest-services wire fraud charge, while the court of appeals adopted this view only with respect to the Hobbs Act. *See* Pet. App. 59a-62a.

[7] *See* Schouten, *supra* note 4.

[8] *See* Jacobs, *supra* note 4. It would come as no surprise if these trips included opportunities for the cabinet members to speak informally with school officials or school donors about governmental matters of interest to the school.

at the White House, such as state dinners or swearing-in ceremonies. More generally, contributors often receive, as President Clinton once put it, a "respectful hearing if they have some concern about the issues."[9]

- Even federal judges may receive free transportation, lodging, and meals for attending conferences and giving lectures that foster a healthy and informed relationship between bench and bar.[10]

The court of appeals' decision would cast a shadow of illegality over legitimate, pro-democratic activities such as these. Public officials would be forced constantly to question whether the donor or host subjectively believes that he or she is buying the first step to a potentially favorable outcome.

The court of appeals' decision thus impermissibly shifts to the executive branch the critical task of drawing the line between those commonplace interactions that will result in prosecution and those that will not. Prosecutors in the future may be faced with the temptation to yield to pressure or make a name for themselves by pursuing charges against particular public officials in high-profile matters. Armed with the Fourth Circuit's decision, they would need only to select a "quid" from among the official's lawful campaign contributions or other legitimate receipts, identify an action of the type customarily performed by public officials as the ostensible "quo," and pursue indictment and possible conviction.

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9 Pace, *supra* note 3.

10 *See* Young et al., *supra* note 4.

Rather than risk prosecution, many federal officials will be tempted simply to seal themselves off from interactions with any person or group who has given them anything of value. Federal officials will face the same type of practical problem that one Virginia lawmaker pithily described after the jury convicted: "Technically speaking, I cannot go to a Rotary Club breakfast and eat $7 worth of eggs if somebody asks me to set up a meeting with the DMV."[11] For those who decide to take the risk, informal and everyday interactions may need to be cleared in advance after a fact-intensive investigation and analysis by the lawyers who advise those officials. Individuals who value their reputation for integrity—not to mention their freedom—would need to think long and hard before even entering public service. Ultimately, public service in our representative democracy would be diminished.

The court of appeals' sweeping approach also threatens to create complications with the "intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials," *Sun-Diamond*, 526 U.S. at 409, by rendering certain behaviors *criminal* that may well be entirely *ethical*. As a result, lawyers who advise federal officials on such matters will be hard pressed to suggest with certainty any safe harbor from potential federal indictment when it comes to an official's interactions with donors or other members of the public.

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[11] Michael Pope, *Virginia Lawmakers Cautious About Ethics—And Eggs—After McDonnell Conviction*, WAMU 88.5 (Dec. 15, 2014), http://goo.gl/0ezv7y.

Indeed, the decision below portends a minefield for public officeholders in the Washington, D.C. area, many of whom reside within, or sometimes venture into, the jurisdiction of the Fourth Circuit. For them, conduct that is not an "official act"—as the D.C. Circuit has interpreted that term—could nonetheless form the basis for a federal criminal conviction if prosecuted in the Fourth Circuit. *See Ring*, 706 F.3d at 469; *Valdes v. United States*, 475 F.3d 1319, 1325 (D.C. Cir. 2007) (en banc). This confusing state of affairs will inevitably result in an intolerable double standard, with prosecution (or not) of similar conduct turning on whether venue can be established in the suburbs of our Capital.

CONCLUSION

This Court's review is necessary to preserve the ability of public officials to represent and serve the citizens of this country by allowing them access to information of concern to the public without running the risk of criminal liability. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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